No. 46935-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Koran Butler,

Appellant.

Pierce County Superior Court Cause No. 14-1-00453-4

The Honorable Judge John Hickman

Appellant's Opening Brief

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

WASHINGTON STATE CASES

CONSTITUTIONAL PROVISIONS

WASHINGTON STATUTES

OTHER AUTHORITIES

ISSUES AND ASSIGNMENTS OF ERROR

1. The court's instructions violated Mr. Butler's Wash. Const. art. I, § 21 right to a unanimous verdict.

2. The court erred by failing to instruct the jury that it had to unanimously agree as to the means by which Mr. Butler had committed identity theft.

3. The court's error requires reversal because the state did not present substantial evidence supporting all four alternative means of committing identity theft.

> **ISSUE 1:** The right to a unanimous verdict includes the right to jury unanimity regarding the means by which a crime was committed. Did the court's failure to require unanimity as to means violate Mr. Butler's right to a unanimous verdict?

> **ISSUE 2:** Absent a special verdict or instructions requiring unanimity as to means, a conviction must be reversed unless the state presents substantial evidence as to each alternative submitted to the jury. Does the state's failure to prove a "transfer" of financial information require reversal of Mr. Butler's identity theft conviction?

4. Defense counsel's ineffective assistance deprived Mr. Butler of his Sixth and Fourteenth Amendment right to counsel.

5. Defense counsel provided deficient performance at sentencing by failing to argue same criminal conduct for Mr. Butler's forgery and identity theft convictions.

6. Mr. Butler was prejudiced by his attorney's deficient performance.

> **ISSUE 3:** Defense counsel provides ineffective assistance by failing to argue at sentencing that two offenses should be scored together as the same criminal conduct. Was Mr. Butler denied his right to the effective assistance of counsel at sentencing when his attorney failed to argue that his forgery

and identity theft offenses (which occurred at the same time and place and involved the same intent and victim) scored as the same criminal conduct?

7. The court erred by ordering Mr. Butler to pay $1,550 in legal financial obligations absent any inquiry into whether he had the means to do so.

8. The court erred by entering finding of fact 2.5. CP 50.

ISSUE 4: A court may not order a person to pay legal financial obligations (LFOs) without conducting an individualized inquiry into his/her means to do so. Did the court err by ordering Mr. Butler to pay $1,550 in LFOs while also finding him indigent and without analyzing whether he had the money to pay?

9. The trial court erred by giving Instruction No. 2.

10. The trial court's reasonable doubt instruction violated Mr. Butler's right to due process under the Fourteenth Amendment and Wash. Const. art. I, § 3.

11. The trial court's reasonable doubt instruction violated Mr. Butler's right to a jury trial under the Sixth and Fourteenth Amendments and Wash. Const. art. I, §§ 21 and 22.

12. The trial court's reasonable doubt instruction unconstitutionally shifted the burden of proof and undermined the presumption of innocence.

13. The trial court's instruction improperly focused jurors on "the truth of the charge" rather than the reasonableness of their doubts.

ISSUE 5: A criminal trial is not a search for the truth. By equating proof beyond a reasonable doubt with "an abiding belief in the truth of the charge," did the trial court undermine the presumption of innocence, impermissibly shift the burden of proof, and violate Mr. Butler's constitutional right to a jury trial?

ISSUE 6: A juror with reasonable doubt must acquit, even if unable to articulate a reason for the doubt. By defining a "reasonable doubt" as a doubt "for which a reason exists," did the trial court undermine the presumption of innocence,

impermissibly shift the burden of proof, and violate Mr. Butler's constitutional right to a jury trial?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Koran Butler walked into a branch of Heritage Bank to cash a check for some auto work he had done. RP 69, 80. He presented the teller with his Florida driver's license, bearing his name and photo. RP 88. Because his license was from out-of-state, he also wrote his local address and phone number on the check.[1] RP 88; Ex. 1.

The teller became suspicious because of Mr. Butler's out-of-state driver's license and because the check was made out to "K. Butler," rather than listing his full first name. RP 81; Ex. 1.

The teller gave the check to her supervisor, who determined that the signature did not match that on file for the account-holder.[2] RP 82. The bank called the account holder, who said that she had not written the check. RP 84-85.

The state charged Mr. Butler with forgery, identity theft in the second degree, and attempted theft in the second degree.[3] CP 1-2.

After a brief trial, the court instructed the jury on each of the means of committing identity theft, including: obtaining, possessing,

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[1] The address Mr. Butler wrote on the check had one digit different from the address that the police officer wrote on the police report. RP 121-122.

[2] The account from which the check was drawn was with Heritage Bank. Ex. 1.

[3] The check was made out for $1,500. Ex 1.

transferring, or using a means of identification or financial information of another person. CP 22. The court did not instruct the jury that it had to unanimously agree as to the means by which Mr. Butler had committed the offense. CP 12-41.

The court also instructed the jury that a reasonable doubt was one "for which a reason exists." CP 16. The instruction defined satisfaction beyond a reasonable doubt as an abiding belief "in the truth of the charge." CP 16.

The jury convicted Mr. Butler of each of the three charges. RP 198.

For sentencing purposes, Mr. Butler's attorney stipulated to the state's calculation of his offender score, which did not count the forgery and identity theft convictions as the same criminal conduct. Stipulation to Prior Record, Supp. CP.

The court did not conduct any inquiry into Mr. Butler's financial situation at sentencing. CP 205-209. The court found Mr. Butler indigent for purposes of appeal. CP 66-68. Still, the court ordered him to pay $1,550 in legal financial obligations. CP 51.

This timely appeal follows. CP 65.

ARGUMENT

I. MR. BUTLER'S CONVICTION FOR IDENTITY THEFT VIOLATED HIS RIGHT TO A UNANIMOUS VERDICT BECAUSE THE STATE DID NOT PRESENT SUBSTANTIAL EVIDENCE TO SUPPORT EACH ALTERNATIVE MEANS IN THE TO-CONVICT INSTRUCTION AND THE COURT DID NOT REQUIRE AN EXPRESSION OF UNANIMITY.

The court instructed the jury on each of the statutory alternative means of committing identity theft. CP 22. But the instructions did not require the jury to unanimously agree as to which means Mr. Butler had committed. CP 12-41.

Because the state did not present any evidence to support at least one of the alternative means, the lack of a unanimity requirement violated Mr. Butler's constitutional right to a unanimous verdict. *State v. Elmore*, 155 Wn.2d 758, 771 n. 4, 123 P.3d 72 (2005).

An accused person has a state constitutional right to a unanimous jury verdict.[4] Art. I, § 21; *Elmore*, 155 Wn.2d at 771 n. 4. This right also includes the right to jury unanimity on the *means* by which the defendant is found to have committed the crime. *State v. Lobe*, 140 Wn. App. 897, 903-905, 167 P.3d 627 (2007). A particularized expression of unanimity

[4] Constitutional issues are reviewed *de novo*. *Dellen Wood Products, Inc. v. Washington State Dep't of Labor & Indus.*, 179 Wn. App. 601, 626, 319 P.3d 847 (2014) *review denied*, 180 Wn.2d 1023, 328 P.3d 902 (2014). A trial court's failure to provide a unanimity instruction is a manifest error affecting the constitutional right to a unanimous verdict. *State v. Moultrie*, 143 Wn. App. 387, 392, 177 P.3d 776 (2008); RAP 2.5(a)(3). Such errors can be raised for the first time on appeal. *Moultrie*, 143 Wn. App. at 392; *State v. Kiser*, 87 Wn. App. 126, 129, 940 P.2d 308 (1997).[4]

(in the form of a special verdict) is required unless there is sufficient evidence to support each alternative means submitted to the jury. *State v. Ortega-Martinez*, 124 Wn.2d 702, 707-708, 881 P.2d 231 (1994).

Accordingly, when the court instructs the jury regarding alternative means of committing an offense and does not require an expression of unanimity, reversal is required unless the state produced substantial evidence in support of each of the alternative means. *State v. Hayes*, 164 Wn. App. 459, 473, 262 P.3d 538 (2011).

In Mr. Butler's case, the court instructed the jury on the alternative means of committing identity theft for obtaining, possessing, transferring, or using a means of identification or financial information of another person. CP 22.

The court's instruction did not inform the jury that they had to be unanimous as to the means by which Mr. Butler had committed identity theft. Nor did the court provide the jury with a special verdict form. CP 12-41.

This error requires reversal of Mr. Butler's conviction because the state did not present any evidence to prove at least one of the alternative means. *Hayes*, 164 Wn. App. at 473. There was no evidence that Mr. Butler "transferred" financial information.

The state's theory was that the account number printed on the check Mr. Butler tried to cash constituted "financial information". RP 163. While Mr. Butler did hand the check to the bank teller, he was at the bank where the account associated with the check was held. RP 69, 80; Ex. 1. Accordingly, the bank certainly already had the "account information" he provided. There was no evidence that he "transferred" any account information.

The court violated Mr. Butler's right to a unanimous verdict by instructing the jury regarding alternative means of identity theft that were not supposed by substantial evidence and not requiring the jury to be unanimous as to means. *Hayes*, 164 Wn. App. at 481. Mr. Butler's identity theft conviction must be reversed. *Id.*

II. MR. BUTLER'S ATTORNEY PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO ARGUE THAT HIS TWO OFFENSES CONSTITUTED THE SAME CRIMINAL CONDUCT FOR SENTENCING PURPOSES.

Mr. Butler's convictions for forgery and identity theft should have been counted as the same criminal conduct for sentencing purposes. Instead of bringing that to the court's attention, however, his attorney stipulated to the state's calculation of his offender score, which scored them separately.

Mr. Butler's attorney provided ineffective assistance of counsel by stipulating to an improperly-calculated offender score.

The right to counsel includes the right to the effective assistance of counsel.[5] U.S. Const. Amends. VI, XIV; *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Counsel's performance is deficient if it falls below an objective standard of reasonableness. *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). Deficient performance prejudices the accused when there is a reasonable probability that it affected the outcome of the proceeding. *Id.*

An accused person has a right to the effective assistance of counsel at sentencing. *Gardner v. Florida*, 430 U.S. 349, 358, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977). Defense counsel provides ineffective assistance by failing to validly raise that two offenses comprise the same criminal conduct for sentencing purposes. *State v. Phuong*, 174 Wn. App. 494, 548, 299 P.3d 37 (2013).

When calculating the offender score, a sentencing judge must determine how multiple current offenses are to be scored. Under RCW

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[5] Ineffective assistance of counsel is an issue of constitutional magnitude that can be raised for the first time on appeal. *Kyllo*, 166 Wn.2d at 862; RAP 2.5(a).

An ineffective assistance claim presents a mixed question of law and fact, reviewed *de novo*. *In re Fleming*, 142 Wn.2d 853, 865, 16 P.3d 610 (2001); *State v. Horton*, 136 Wn. App. 29, 146 P.3d 1227 (2006). Reversal is required if counsel's deficient performance prejudices the accused. *Kyllo*, 166 Wn.2d at 862 (citing *Strickland* 466 U.S. at 687).

9.94A.589(1)(a). Two current offenses are not scored against one another if they constitute the same criminal conduct:

> ... If the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime... "Same criminal conduct," as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim...

RCW 9.94A.589(1)(a).

Here, Mr. Butler's forgery and identity theft convictions were both based on the same conduct at the bank. They involved the same victim and the same criminal intent of obtaining money from her account.

Accordingly, Mr. Butler's convictions for forgery and identity theft would have been scored as the same criminal conduct if defense counsel had raised it.[6] *Id.*

Instead, however, Mr. Butler's attorney stipulated to the state's calculation of his offender score, which counted each of his convictions

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[6] In the burglary context, the supreme court has suggested in *dicta* that the anti-merger statute precludes a finding of same criminal conduct when one of the offenses is burglary. *State v. Lessley*, 118 Wn.2d 773, 827 P.2d 996 (1992). More recently, however, the court backed away from that reasoning, suggesting that the double jeopardy concern addressed by the anti-merger statute is completely separate from the sentencing issue addressed by the same criminal conduct analysis. *State v. Williams*, 181 Wn.2d 795, 800, 336 P.3d 1152 (2014).

The identity theft statute has an anti-merger provision similar to that in the burglar statute. RCW 9.35.020(6). As in the burglary context, however, that provision deals only with double jeopardy concerns and does not preclude a finding of same criminal conduct for sentencing purposes. *Williams*, 181 Wn.2d at 800.

against the other. Stipulation to Prior Record, Supp. CP. Defense counsel provided deficient performance. *Id.*

Mr. Espinoza was prejudiced by his attorney's deficient performance. *Id.* There is a reasonable probability that defense counsel's stipulation to an improperly calculated offender score affected the outcome of the proceeding. *Id.*

Mr. Butler's defense attorney provided ineffective assistance by stipulating to an improperly-calculated offender score. *Phuong*, 174 Wn. App. at 548. Mr. Butler's case must be remanded for resentencing. *Id.*

III. THE TRIAL COURT ERRED BY ORDERING MR. BUTLER TO PAY $1550 IN LEGAL FINANCIAL OBLIGATIONS WITHOUT INQUIRING INTO HIS ABILITY TO PAY.

Mr. Butler was found indigent at the end of trial. CP 66-68. Still, the court ordered him to pay $1,550 in legal financial obligations. CP 51.

The court appeared to rely on boilerplate language in the Judgment and Sentence stating, essentially, that every offender has the ability to pay LFOs. CP 50. But the court did not conduct any particularized inquiry into Mr. Butler's financial situation at sentencing or at any other time. RP 205-209. The court erred by ordering Mr. Butler to pay LFOs absent any indication that he had the means to do so.

The legislature has mandated that "[t]he court *shall not* order a defendant to pay costs unless the defendant is or will be able to pay them."

RCW 10.01.160(3); *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680, 685 (March 12, 2015) (emphasis added by court).

This imperative language prohibits a trial court form ordering LFOs absent an individualized inquiry into the person's ability to pay. *Id.* Boilerplate language in the Judgment and Sentence is inadequate because it does not demonstrate that the court engaged in an individualized analysis. *Id.*

The court must consider personal factors such as incarceration and the person's other debts, including restitution. *Id.*

Here, the court failed to conduct any meaningful inquiry into Mr. Butler's ability to pay LFOs. RP 205-209. The court did not consider his financial status in any way. Indeed, the court also found Mr. Butler indigent for purposes of appeal. CP 66-68.

In fact, the *Blazina* court suggested that an indigent person would likely never be able to pay LFOs. *Id.* ("[I]f someone does meet the GR 34 standard for indigency, courts should seriously question that person's ability to pay LFOs").

RAP 2.5(a) permits an appellate court to review errors even when they are not raised in the trial court. RAP 2.5(a); *Blazina*, 344 P.3d at 683. The *Blazina* court recently chose to review the LFO-related issue raised in this case, finding that "National and local cries for reform of broken LFO

systems demand that this court exercise its RAP 2.5(a) discretion and reach the merits of this case." *Id.*

The Supreme Court noted the significant disparities both nationally and in Washington in the administration of LFOs and the significant barriers they place to reentry of society. *Id.* at 683-85. This court should follow the Supreme Court's lead and consider the merits of Mr. Butler's LFO claim even though it was not raised below.

The court erred by ordering Mr. Butler to pay $1,550 in LFOs absent any showing that he had the means to do so. *Blazina*, 344 P.3d at 685. The order must be vacated and the case remanded for a new sentencing hearing. *Id.*

IV. THE COURT'S "REASONABLE DOUBT" INSTRUCTION INFRINGED MR. BUTLER'S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS.

A. The instruction improperly focused the jury on a search for "the truth."

A jury's role is not to search for the truth. *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012); *State v. Berube*, 171 Wn. App. 103, 286 P.3d 402 (2012). Here, the trial court instructed the jury that proof beyond a reasonable doubt means having "an abiding belief *in the truth of the charge*." CP 16 (emphasis added).

Rather than determining the truth, a jury's task "is to determine whether the State has proved the charged offenses beyond a reasonable doubt." *Emery*, 174 Wn.2d at 760. In this case, the court undermined its otherwise clear reasonable doubt instruction by directing jurors to consider "the truth of the charge." CP 16.[7]

A jury instruction misstating the reasonable doubt standard "is subject to automatic reversal without any showing of prejudice." *Id.* at 757 (citing *Sullivan v. Louisiana,* 508 U.S. 275, 281–82, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993)). Here, by equating proof beyond a reasonable doubt with a "belief in the truth of the charge," the court confused the critical role of the jury. CP 16.

The court's instruction impermissibly encouraged the jury to undertake a search for the truth, inviting the error identified in *Emery*. The problem here is greater than that presented in *Emery*. In that case, the error stemmed from a prosecutor's misconduct. Here, the prohibited language reached the jury in the form of an instruction from the court. CP 16. Jurors were obligated to follow the instruction. CP 16.

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[7] Mr. Butler does not challenge the phrase "abiding belief." Both the U.S. and Washington Supreme Courts have already determined that phrase to be constitutional. *See Victor v. Nebraska*, 511 U.S. 1, 15, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994) (citing *Hopt v. Utah*, 120 U.S. 430, 439, 7 S.Ct. 614, 30 L.Ed. 708 (1887)); *State v. Pirtle*, 127 Wn.2d 628, 658, 904 P.2d 245 (1995). Rather, Mr. Butler objects to the instruction's focus on "the truth." CP 75.

The presumption of innocence can be "diluted and even washed away" by confusing jury instructions. *State v. Bennett*, 161 Wn.2d 303, 315-16, 165 P.3d 1241 (2007). Courts must vigilantly protect the presumption of innocence by ensuring that the appropriate standard is clearly articulated.[8] *Id.*

Improper instruction on the reasonable doubt standard is structural error. *Sullivan*, 508 U.S. at 281-82. By equating that standard with "belief in the truth of the charge" the court misstated the prosecution's burden of proof, confused the jury's role, and denied Mr. Butler his constitutional right to a jury trial.[9]

Mr. Butler's convictions must be reversed. The case must be remanded for a new trial with proper instructions. *Id.*

B. The instruction diverted the jury's attention away from the reasonableness of any doubt, and erroneously focused it on whether jurors could provide a reason for any doubts.

1. Jurors need not articulate a reason for doubt in order to acquit.

Due process requires the state to prove each element of a charged offense beyond a reasonable doubt. U.S. Const. Amend. XIV; art. I, § 3; *Sullivan,* 508 U.S. 275; *State v. Hundley*, 126 Wn.2d 418, 421, 895 P.2d

[8] Although the *Bennett* court approved WPIC 4.01, the court was not faced with a challenge to the "truth" language in that instruction. *Id.*

[9] U.S. Const. Amends. VI, XIV; art. I, §§ 3, 21, 22.

403 (1995). Jury instructions must clearly communicate this burden to the jury. *Bennett*, 161 Wn.2d at 307 (citing *Victor*, 511 U.S. at 5-6).

Instructions that relieve the state of its burden violate due process and the Sixth Amendment right to trial by jury. U.S. Const. Amends.VI; XIV; *Sullivan*, 508 U.S.at 278-81; *Bennett*, 161 Wn.2d at 307. An instruction that misdirects the jury as to its duty "vitiates *all* the jury's findings." *Sullivan,* 508 U.S.at 279-281.

Jurors need not articulate a reason for their doubt before they can vote to acquit. *Emery*, 174 Wn.2d at 759-60 (addressing prosecutorial misconduct). Language suggesting jurors must be able to articulate a reason for their doubt is "inappropriate" because it "subtly shifts the burden to the defense." *Emery*, 174 Wn.2d at 759-60.[10]

Requiring articulation "skews the deliberation process in favor of the state by suggesting that those with doubts must perform certain actions in the jury room—actions that many individuals find difficult or intimidating—before they may vote to acquit..." *Humphrey v. Cain*, 120 F.3d 526, 531 (5th Cir. 1997) *on reh'g en banc,* 138 F.3d 552 (5th Cir.

[10]*See also State v. Walker*, 164 Wn. App. 724, 731-732, 265 P.3d 191 (2011), *as amended* (Nov. 18, 2011), *review granted, cause remanded,* 175 Wn. 2d 1022, 295 P.3d 728 (2012); *State v. Johnson*, 158 Wn. App. 677, 684-86, 243 P.3d 936 (2010) *review denied,* 171 Wn.2d 1013, 249 P.3d 1029 (2011).

1998).[11] An instruction imposing an articulation requirement "creates a lower standard of proof than due process requires." *Id.*, at 534.[12]

2. The trial court erroneously told jurors to convict unless they had a doubt "for which a reason exists."

The trial court instructed jurors that "A reasonable doubt is one for which a reason exists." CP 16. This suggested to the jury that it could not acquit unless it could find a doubt "for which a reason exists." CP 16. This instruction – based on WPIC 4.01 – imposes an articulation requirement that violates the constitution.

A "reasonable doubt" is not the same as a reason to doubt. "Reasonable" means "being in agreement with right thinking or right judgment: not conflicting with reason: not absurd: not ridiculous. . . being or remaining within the bounds of reason... Rational." *Webster's Third New Int'l Dictionary* (Merriam-Webster, 1993). A reasonable doubt is thus one that is rational, is not absurd or ridiculous, is within the bounds of reason, and does not conflict with reason. *Accord Jackson v. Virginia*, 443 U.S. 307, 317, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) ("A 'reasonable doubt,' at a minimum, is one based upon 'reason.'"); *Johnson v.*

[11] The Fifth Circuit decided *Humphrey* before enactment of the AEDPA. Subsequent cases applied the AEDPA's strict procedural limitations to avoid the issue. *See, e.g., Williams v. Cain*, 229 F.3d 468, 476 (5th Cir. 2000).

Louisiana, 406 U.S. 356, 360, 92 S.Ct. 1620, 32 L.Ed.2d 152 (1972) (collecting cases defining reasonable doubt as one "'based on reason which arises from the evidence or lack of evidence'" (quoting *United States v. Johnson*, 343 F.2d 5, 6 n.1 (2d Cir. 1965)).

The "a" before "reason" in Instruction No. 2 inappropriately alters and augments the definition of reasonable doubt. CP 16. "[A] reason" is "an expression or statement offered as an explanation of a belief or assertion or as a justification." *Webster's Third New Int'l Dictionary.* The phrase "a reason" indicates that reasonable doubt must be capable of explanation or justification. In other words, WPIC 4.01 requires more than just a reasonable doubt; it requires an explainable, articulable doubt—one for which a reason exists, rather than one that is merely reasonable.

This language requires more than just a reasonable doubt to acquit. *Cf. In re Winship,* 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) ("[W]e explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt.") Jurors applying Instruction No. 2 could have a reasonable doubt but also have difficulty articulating or explaining why their doubt is

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[12] In *Humphrey,* the court addressed an instruction containing numerous errors, including an articulation requirement. Specifically, the instruction defined reasonable doubt as "a serious doubt, for which you can give a good reason." *Humphrey,* 120 F.3d at 530.

reasonable.[13] For example, a case might present such voluminous and contradictory evidence that jurors with reasonable doubts would struggle putting their doubts into words or pointing to a specific, discrete reason for doubt. Despite reasonable doubt, acquittal would not be an option under Instruction No. 2, if jurors couldn't put their doubts into words. CP 16.

As a matter of law, the jury is "firmly presumed" to have followed the court's reasonable doubt instruction. *Diaz v. State*, 175 Wn.2d 457, 474-475, 285 P.3d 873 (2012). The instruction here left jurors with no choice but to convict unless they had a reason for their doubts. This meant Mr. Butler couldn't be acquitted, even if jurors had a reasonable doubt.

The instruction "subtly shift[ed] the burden to the defense." *Emery*, 174 Wn.2d at 759-60. It also "create[d] a lower standard of proof than due process requires..." *Humphrey,* 120 F.3d at 534. By relieving the state of its constitutional burden of proof, the court's instruction violated Mr. Butler's right to due process and his right to a jury trial. *Id.; Sullivan*, 508 U.S. at 278-81; *Bennett*, 161 Wn.2d at 307. Accordingly, his convictions must be reversed and the case remanded for a new trial with proper instructions. *Sullivan*, 508 U.S. at 278-82.

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[13]See Steve Sheppard, The Metamorphoses of Reasonable Doubt: How Changes in the Burden of Proof Have Weakened the Presumption of Innocence, 78 NOTRE DAME L. REV. 1165, 1213-14 (2003).

CONCLUSION

The court violated Mr. Butler's right to a unanimous verdict as to the identity theft charge. The court's to-convict instruction also violated his rights to due process and to a jury trial by improperly shifting the burden of proof. Mr. Butler's convictions must be reversed.

In the alternative, defense counsel provided ineffective assistance by failing to validly raise that Mr. Butler's forgery and identity theft convictions should have been scored as the same criminal conduct. The court erred by ordering Mr. Butler to pay $1,550 in legal financial obligations while also finding him indigent and without conducting any inquiry into his ability to pay. Mr. Butler's case must be remanded for resentencing.

Respectfully submitted on June 10, 2015,

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CERTIFICATE OF SERVICE

I certify that on today's date:

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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on June 10, 2015.

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